UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 91-50-P-H***
	)	***(Civil No. 96-33-P-H)***
RAYMOND R. DUCHARME,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Raymond R. Ducharme moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Ducharme was convicted of conspiracy to possess with intent to distribute in excess of 500 grams of a substance containing cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B) and § 846. He contends that he suffered the ineffective assistance of counsel during the negotiations that led to his guilty plea, and that the resulting circumstances rendered his plea involuntary. Additionally, Ducharme contends that a failure by the court to inform him prior to sentencing of the applicable sentencing range pursuant to the Federal Sentencing Guidelines deprived him of due process of law.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In this instance, I find that Ducharme's allegations are insufficient to justify relief even if accepted as true, and accordingly I recommend that his motion be denied without an evidentiary hearing.

I. Background

The record reflects that Ducharme waived indictment and pleaded guilty to a charge of conspiring to possess with intent to distribute in excess of 500 grams of cocaine.[1] Transcript of Rule 11 Proceedings ("Rule 11 Tr.") (Docket No. 21) at 5. At the hearing at which he entered the plea, the court explicitly warned Ducharme that his conviction of the charged offense could expose him to a fine of up to $2 million and imprisonment of not less than five and not more than 40 years. *Id*. at 6-7. The government indicated that it was prepared to prove the existence of the charged conspiracy through the testimony of at least four cooperating witnesses. *Id*. at 9; Exh. 1 to Government's Response (Docket No. 16). Ducharme's attorney indicated that he was "quite sure" the government would be able to prove its case, and Ducharme himself stated that he did not disagree with anything in the factual statement supplied by the government. Rule 11 Tr. at 9-10. Thereafter, the court informed Ducharme that it had the final authority to determine his sentence, which would be subject to the federal sentencing guidelines. *Id*. at 12. Defense counsel indicated that he had not "gone into the guidelines" when discussing the likely sentence with his client. *Id*. The court found this response to be unsatisfactory, advising defense counsel that Ducharme "need[ed] to be further instructed" about the guidelines. *Id*.

Counsel thereupon clarified that he had in fact discussed the guidelines with Ducharme, telling him that the sentence was "all up to the judge on the basis of the guidelines." *Id*. at 13-14. Ducharme indicated that no one had made any promises to him concerning the sentence the court

[1] The judgment ultimately entered by the court (Docket No. 7) erroneously refers simply to possession with intent to distribute, rather than conspiracy to possess with intent to distribute. The error is not material to the matters presently before the court.

would ultimately impose. *Id*. at 16. Based on these representations, the court accepted the plea of guilty. *Id*.

Following the completion of a presentence report and its review by the court, the court accepted the government's recommendation that Ducharme be sentenced at the low end of the applicable guideline range, i.e., incarceration of 108 months.[2] Transcript of Proceedings, February 7, 1992 ("Sentencing Tr.") (Docket No. 8) at 12. Pursuant to the Sentencing Guidelines, this calculation was based on a Total Offense Level of 30 and a Criminal History Category of II. Memorandum of Sentencing Judgment (Docket No. 6) at 2. The court noted that others involved in the conspiracy had received sentences that were "somewhat lower" than Ducharme's, suggesting that their "different criminal history" or "extensive cooperation" might account for the difference. Sentencing Tr. at 12.

It is Ducharme's present contention that the negotiations leading up to the plea agreement were marred by miscommunication and in some instances noncommunication between him and his attorney. According to Ducharme, he had no knowledge that his attorney had approached the government to express a willingness to cooperate and, indeed, had no awareness of what cooperating would entail. Memorandum in Support of Motion ("Defendant's Memorandum") (Docket No. 10) at 2. Thereafter, Ducharme and his counsel met with Assistant U.S. Attorney Nicholas Gess; Ducharme contends he thought the meeting was to permit him to learn about the evidence against him when, in fact, his attorney had scheduled the meeting to permit Ducharme to provide information to the government. *Id*. at 3. According to Ducharme, Gess "promised no specific

[2] There was a factual dispute as to the amount of cocaine involved in the conspiracy, but the court indicated that the dispute was not material to its sentence, Sentencing Tr. at 10, and the issue is not germaine to the pending motion. The court also imposed a fine of $500 and a four-year term of supervised release following incarceration. *Id*. at 12.

sentence" but "did give . . . examples of sentences of 10 months, 3 years and 4 years. [Defense counsel] also focused on the possibility of [Ducharme's] receiving a sentence of between three and four years." *Id.*

Ducharme states that neither his attorney nor the government ever had a discussion with him about the Sentencing Guidelines, or the effect of his criminal history on his sentence pursuant to the Guidelines. *Id.* He further states that his attorney never discussed the possibility of going to trial and never required the government to provide any discovery. *Id.* at 4. Rather, according to Ducharme, his attorney repeatedly told him and his family that Ducharme might expect to serve three to four years in prison. *Id.* at 10. Ducharme further avers that when he reviewed the presentence report with his attorney, and noted the proposed sentencing range of 108 to 135 months, the attorney stated that a sentence of that magnitude was impossible. *Id.* [sworn?] Ducharme states in a sworn affidavit that "it is because of counsel's deficiencies [that he] pleaded guilty." Affidavit of Raymond Ducharme (Docket No. 19) ("Ducharme Affidavit") at 2.

II. Ineffective Assistance of Counsel

To prevail on his claim of ineffective assistance of counsel, Ducharme must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), as applied to cases in which the advice of counsel led to a plea of guilty. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). He must demonstrate "that his attorney's performance was unreasonably deficient, and that he was prejudiced as a result of it." *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *cert. granted*, 135 L.Ed. 2d 1066 (1996) (citation omitted). When, as here, a defendant has pleaded guilty to the charge at issue, "the prejudice prong of the test requires him to show that, but for his counsel's

unprofessional errors, he probably would have insisted on his right to trial." *Id*. (citing *Hill*, 474 U.S. at 59).

Accepting, as I must for present purposes, that Ducharme's counsel provided either no advice or wrong advice as to now the Sentencing Guidelines would apply to his case, I conclude that he has not established the requisite prejudice. "An attorney's inaccurate prediction of his client's probable sentence, standing alone, will not satisfy the prejudice prong of the ineffective assistance test." *LaBonte*, 70 F.3d at 11413 (citing *Knight v. United States*, 37 F.3d 769, 774 (1st Cir. 1994). Further a defendant falls short of establishing prejudice by supplying a statement that, "but for his counsel's inadequate advice he would have pleaded not guilty, unaccompanied by either a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial." *LaBonte*, 70 F.3d at 1413.

Here, Ducharme neither straightforwardly asserts his innocence nor states that he would have pleaded not guilty if he had received adequate advice from his attorney. Rather, he somewhat cryptically avers -- in response to the government's having highlighted the lack of such a statement -- that he pleaded guilty "because of counsel's deficiencies." Ducharme Affidavit, supra. He goes on to state that:

> I would have gone to trial had I known how vulnerable the Government witnesses were to impeachment and how little independent evidence against me there was, and also, had I been aware how much time I would have to serve on my guilty plea. I was not guilty as charged and would establish that at any new trial.

Id. at 2.

Ducharme's statement that he is "not guilty as charged" is insufficient to establish prejudice because, strictly speaking, it cannot be understood as an assertion of innocence. During the plea colloquy at the Rule 11 hearing, Ducharme stated that the government's written version of the events

in question was in fact correct based on his personal knowledge. Rule 11 Tr. at 10. His present affidavit does not repudiate or contradict this sworn statement. *See United States v. Horne*, 987 F.2d 833, 836 (D.C. Cir.), *cert. denied*, 510 U.S. 852 (1993) (defendant did not repudiate statements at plea colloquy and thus does not maintain innocence); *cf. United States v. Sanchez-Barreto*, 93 F.3d 17, 1996 WL 466900, No. 95-1297, slip op. at 15 (1st Cir. Aug. 21, 1996) (no credit due on plea withdrawal motion to "bare protestations of innocence" after "flawless Rule 11 proceedings" in which defendants "freely admitted" guilt); *United States v. Isom*, 85 F.3d 831, 839 (1st Cir. 1996) (to similar effect). It therefore can be understood only as a statement that the government would be unable to meet its burden of proof if the matter were to go to trial.

That, as the Court of Appeals made clear in *LaBonte*, is insufficient unless Ducharme comes forward with a plausible defense that he could have raised at trial. To that end, Ducharme contends that the government's case was weak because it could produce no direct evidence -- in the form of actual cocaine purchased or sold by him, or testimony from an actual buyer -- and because the government's witnesses "were subject to severe and obvious credibility problems." Memorandum in Support of Motion (Docket No. 10) at 17. According to Ducharme, the court should conclude he would have successfully impeached these witnesses at trial because there was "at least one acquittal, one probated sentence imposed after the start of trial, and at least one mistrial" in other prosecutions stemming from the same conspiracy and, presumably, involving the same witnesses. *Id*. Elsewhere, Ducharme argues that his attorney's failure to pursue discovery "blotted out substantial defenses, including criminal records [presumably, of the government's witnesses], deals, credibility of witnesses, and agreements together with factual defenses as to the extent of any alleged conspiracy." Petitioner's Reply (Docket No. 18) at 5.

These conclusory allegations about witness credibility are not sufficient to establish a plausible defense that Ducharme could have raised at trial. In effect, Ducharme invites the court to speculate about what prompted different outcomes in separate though related proceedings. In my opinion, the rule described in *LaBonte* requires a defendant to do more than that, and to provide the court with some articulable reason for concluding that the government's witnesses lacked credibility and, thus, that the defendant has lost a plausible defense. If the credibility problems with these witnesses are as "severe and obvious" as he contends, then it is reasonable to expect Ducharme to set forth those problems, in something more than conclusory fashion, in the context of the instant motion. Even if Ducharme failed to ascertain the extent of the available defenses during the underlying criminal proceedings because his attorney did not pursue discovery, as he alleges, he is now represented by new counsel and is thus not excused by such failure to come forward now with a plausible defense.

Additionally, the record of the Rule 11 proceedings belies Ducharme's contention that he thought, based on his attorney's advice, that he would receive a sentence in the three-to-four year range. The court unmistakably advised Ducharme that he faced a minimum penalty of five years. Ducharme specifically indicated that he understood that he understood both the charges against him and the penalties to which he would be subject if convicted. Rule 11 Tr. at 7. This, in itself, breaks the "but for" link that LaBonte requires between any erroneous advice by the attorney and Ducharme's decision to plead guilty.

Ducharme's contention that his counsel's errors rendered his plea involuntary must also fail for the reasons described above. The Supreme Court made clear in *Hill* that while "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of

attorneys in criminal cases," the prejudice prong of the *Strickland* test applies whether the contention is ineffective assistance of counsel directly or that ineffective assistance rendered a plea involuntary. *Hill*, 474 U.S. at 56-57 (citations and internal quotation marks omitted).

III. Due Process

Ducharme next contends that the court deprived him of his right to due process by failing to inform him during the Rule 11 proceedings that its discretion in imposing sentence was significantly restricted by the Sentencing Guidelines. He concedes the court informed him during the Rule 11 colloquy that his potential exposure was five to 40 years of incarceration, but maintains that the Constitution requires the court to provide a further warning that the court lacked unfettered discretion, in light of the Guidelines, to place him anywhere along that continuum.

The authorities cited by Ducharme, principally from the Seventh Circuit, do not support his position. That court has indeed suggested that "defendants will be able to make more intelligent choices about whether to accept a plea bargain if they have as good an idea as possible of the likely Guidelines result," but it explicitly "decline[d] to find that Rule 11 requires the court to predict the applicable sentencing range." *United States v. Salva*, 902 F.2d 483, 488 (7th Cir. 1990) (emphasis omitted). In so holding, the court explicitly rejected the argument that notions of "fundamental fairness" requires the court to advise a defendant of the likely sentencing range under the Guidelines, noting that due process "does not oblige the government or the court to predict the defendant's sentence."[3] *Id*. at 487 (citing *United States v. Fernandez*, 877 F.2d 1138, 1142-43 (2d Cir. 1989)).

[3] Ducharme also cites *Salva* and another Seventh Circuit case, *United States v. Price*, 988 F.2d 712 (7th Cir. 1993) to suggest that the court should have waited until the completion of the presentence report, thus enabling it to assess the applicability of the Guidelines fully, prior to accepting the plea. But as *Price* makes clear, this principle applies only in a case in which the (continued...)

In *United States v. Padilla*, 23 F.3d 1220, (7th Cir. 1994), the same court concluded that a trial court conducting a Rule 11 colloquy is obligated to apprise the defendant of his "likely exposure" in a drug case where the statutory minimum and maximum penalties will vary with the quantity of drugs involved, as ascertained in the presentence report. *Id*. at 1224. There is no suggestion here that the trial court failed to advise Ducharme of the statutory range, and Padilla is simply inapposite. Most recently, in *U.S. v. Dias-Vargas*, 35 F.3d 1221 (7th Cir. 1994), the court determined that it was harmless error at a Rule 11 proceeding to fail to inform a defendant with precision that he would not be able to withdraw his guilty plea if the sentencing court ultimately did not accept the government's recommendation. Id. at 1225. Again, those circumstances are absent here.

No other authorities of which I am aware support the notion that due process, or the concepts of general fair play that undergird Rule 11, require the court to calculate and disclose the guideline range prior to accepting a guilty plea. Several circuits have held directly to the contrary. *See United States v. DeFusco*, 949 F.2d 114, 118 (4th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992); *United States v. Rhodes*, 913 F.2d 839, 843 (10th Cir. 1990), *cert. denied*, 498 U.S. 1122 (1991) ; *United States v. Thomas*, 894 F.2d 996, 997 (8th Cir.), *cert denied*, 495 U.S. 909 (1990); *United States v. Henry*, 893 F.2d 46, 49 (3d Cir. 1990); *United States v. Turner*, 881 F.2d 684, 686 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989); *Fernandez*, 877 F.2d at 1143. As the Third Circuit noted in *Henry*, "any estimate of the guideline range that the district court would give in advance of the pre-sentence

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[3](...continued)
government is recommending a specific sentence. *Id*. at 720. Ducharme further invokes the District of Columbia Circuit's view, as expressed in Horne, that district courts should make presentence reports available to defendants prior to taking their pleas "wherever feasible." *Horne*, 987 F.2d at 839 (Buckley, J., writing separately for the court). But, as Judge Buckley made clear, the reason his separate statement is not part of the court's opinion is that the views expressed therein are "a suggestion that is without the force of law." *Id*. at 838.

report might well turn out to be misleading and could [itself] be the basis for a contention that the guilty plea should be invalidated." *Henry, supra*.

The purpose of proceedings conducted pursuant to Rule 11 is "to ensure that a guilty plea represents a voluntary and intelligent choice for the defendant." *Fernandez,* 877 F.2d at 1138. In this case, Ducharme came before the court and indicated that he understood when advised that the statutory range of five to 40 years applied, that the court would also have to apply the sentencing guidelines, and that the ultimate sentence to be imposed would only be determined after Ducharme had made an irrevocable plea. I do not believe that Rule 11, or the principles of due process and fairness that undergird the rule, require anything more.

IV. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 27th day of September, 1996.

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David M. Cohen
United States Magistrate Judge